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No. 82-1800

In The
Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF CONNECTICUT,
Petitioner,

v.

GEORGIOS ZINDROS
Respondent,

On Writ of Certiorari to the Supreme Court
of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a landlord may properly consent to a warrantless police and fire search of burnt-out premises leased exclusively to the tenant?

2. Whether the tenant possessed a reasonable expectation of privacy from a warrantless governmental intrusion and search occurring eleven (11) days after the fire?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1800

THE STATE OF CONNECTICUT,

Petitioner,

v.

GEORGIOS ZINDROS,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Georgios Zindros, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on February 15, 1983.

JURISDICTION

The Respondent does not concede jurisdiction as to the purported "good faith" issue. Although the good faith issue was pressed before the Connecticut Supreme Court, it was not passed upon by the Court. See § A, infra.

STATEMENT OF THE CASE

Facts

On February 12, 1977, a fire occurred at a pizza restaurant operated by and leased exclusively to the defendant, Georgios Zindros. (Tr. 6, 54). The building was owned by one Louis Cipriano. (Tr. 54). The trial court found that the premises suffered damage to the interior from the fire and smoke and that the local fire department extinguished the fire within a reasonable time on the same day. (Memo. of Decision, Pet. App. B p. 1b).

The landlord boarded up the premises on February 13, 1977. (Tr. 58). The owner testified that he had paid "$51,000.00 or $52,000.00" for the premises in 1975 (Tr. 55) and he received a $21,000.00 insurance settlement for the fire damage. (Tr. 56). The defendant was informed of the fire by his daughter on February 13, 1977, and told that the place had "boards in front". (Tr. 123). The defendant then proceeded to the premises, saw that it was boarded, and departed. (Tr. 123). The defendant then contacted the Fire Marshall and they met at the premises on February 14th in the morning. (Tr. 107). The defendant entered the premises by removing the plywood from the front door. (Tr. 108). The fire was out; there was no smoldering or smoking at that time. (Tr. 109). When he departed from the premises on the 14th the defendant resecured the premises by hammering the plywood back on the door. (Tr. 109).

Testimony by the defendant reveals that he had substantial restaurant equipment located in the premises at the time of the fire. (Tr. 109). This was corroborated by the testimony of Trooper Zuraitis who testified that he viewed an "oven", "booths", "refrigerator" and restaurant facilities in general within the premises at the time of the warrantless search on the 23rd. (Tr. 52). In fact the State stipulated that there was substantial restaurant property in the premises on February 16th. (Tr. 112). With regard to the property, the defendant re-entered the premises on February 16, 1977 with an appraiser to determine the extent of damage to his equipment. (Tr. 113). He testified that he wanted to "fix the restaurant and go back to work" (Tr. 118) since his restaurant equipment, including ovens, stoves, and refrigerators was repairable. (Tr. 119). During this visit to the premises with the appraiser, the

defendant noticed the landlord inside the building and told him to "get out." (Tr. 65). The landlord then left the premises. (Tr. 65). On several occasions subsequent to February 16th the defendant re-entered his premises and each time re-secured them (Tr. 137) because he wanted "to stay and start business" (Tr. 138), "to put the place in order again" (Tr. 132), and because "...I had my merchandise in there." (Tr. 143). Further, the defendant wanted to keep the children from breaking in. (Tr. 137).

The trial court found that the defendant had not abandoned his leasehold interest in the premises. (Memo. of Decision, Pet. App. p. 3b). The court further found that the bare statement attributed to the defendant that he was "out of business" cannot be given any additional meaning other than the obvious truth of the remark itself, and certainly cannot be stretched

to indicate an intent on the defendant's part to abandon the premises with all his valuable equipment still in it. (Memo. of Decision, Pet. App. p. 3b).

The defendant lived in Waterbury. (Tr. 100). The warrantless search occurred eleven days after the fire. (Tr. 13). There was no exigency to search at that time. (Tr. 109). Prior to the warrantless search on February 23rd, the defendant was regarded as a "suspect" by the police. (Tr. 19). They knew he operated the restaurant. (Tr. 19). Indeed, Waterbury Police Detective Solomita testified that he may have eaten there on occasion. (Tr. 15). Other city officials from the Fire Marshall's office and the Health Department knew of the defendant's interest in the premises and had been in contact with him on several occasions subsequent to the fire. (Tr. 23, 90, 91). On February 23rd, Detective Solomita, despite his knowledge of the

defendant's interest in the premises, never contacted the defendant. Instead he went to the owner's office on Fairfield Avenue and requested from him permission to search the Highland Avenue premises. (Tr. 13). The owner then proceeded to the premises, removed the plywood from the front door with a wrecking bar (Tr. 60), and admitted Detective Solomita, Officer Gary of the Waterbury Police Department, Deputy Fire Marshall Murphy and Trooper Zuraitis of the State Police. (Tr. 40, 41). When the officers entered the premises leased to the defendant, they had no warrant. Neither did they have the consent of the defendant. (Tr. 14, 15, 35, 49, 138, 139). The purpose of this entry was to "take evidence" according to the testimony by the owner. (Tr. 61). Upon entry, they took photographs and collected other items of evidence, including air samples and a piece of carpet charred by the fire with the

consent of the owner. (Tr. 42, 43).

There was no testimony that these officials made any inquiry of the owner as to his authority to consent to this warrantless search. In fact, Trooper Zuraitis testified that he never spoke to the owner. (Tr. 15, 41). Despite Detective Solomita's knowledge that the defendant operated the restaurant (Tr. 19), there is no testimony that he made any inquiry of the owner as to his authority to permit a warrantless search of his tenant's premises. The lease between the owner and the defendant provided in part that the owner had the right to repair the premises in the event of fire and had the option to declare the lease null and void. (Pet. App. F p. 1f). The owner never told the defendant that the lease was terminated. (Tr. 142). In fact, the owner demanded rent for the month succeeding the fire. (Tr. 136).

Rulings Below

The respondent accepts as accurate the petitioner's statement of the rulings below subject to the following exceptions. The Connecticut Supreme Court explicitly did not decide whether there exists a good faith exception to the exclusionary rule because it deemed the police conduct unreasonable under the circumstances and hence there was no need to decide whether an exception to the exclusionary rule exists, 189 Conn. at 254, 255. (Pet. App. A at pp. 23a, 24a).

ARGUMENT

REASONS FOR DENYING THE WRIT

A.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE "GOOD FAITH" CLAIM

The decision of the Connecticut court in State v. Zindros, 189 Conn. 228, 456 A.2d 288 (1983), is an inappropriate subject for the granting of a writ of certiorari by this Court. At the outset, the respondent believes that it is critical to note that the present case cannot fairly be characterized as a "good faith" decision. The record below does not support the petitioner's "good faith" claim. The issues of "apparent authority" or "reasonable good faith belief" were neither presented to the trial court nor addressed in the trial court's memorandum of decision. (189 Conn. 228, 251; Pet. App. A p. 21a). No testimony was presented regarding the good faith of the police officers. Although

the "good faith" and "apparent authority" claims were briefed and argued in the Connecticut Supreme Court, that court, after examining the evidence, concluded that the police did not demonstrate the necessary good faith belief and therefore the court explicitly found no need to "decide whether such an exception to the exclusionary rule exists." State v. Zindros, supra, 254, 255. (Pet. App. A pp. 23a, 24a).

The state of the record below underscores several reasons why the granting of certiorari would be inappropriate. In the first instance, the jurisdiction of this Court to review the "good faith" claim is not at all clear. In Illinois v. Gates, ____ U.S. ____, 76 L.Ed. 2d 527, 103 S.Ct. ____ (1983), this court discussed the "not pressed or passed upon below" rule, but did not decide whether the rule was jurisdictional or prudential. Id. 538. If in fact the rule is jurisdictional as the

decisions in Crowell v. Randell, 10 Pet. 368, 391 (1836), McGoldrick v. Compagnie Generale, 309 U.S. 430, 434-35 (1940), State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154, 160 (1945) and Hill v. California, 401 U.S. 797, 805-6 (1971), suggest, then this Court is without jurisdiction to reach the "good faith" claim due to the fact that the Connecticut Supreme Court did not pass upon the issue.

B

WEIGHTY PRUDENTIAL AND POLICY CONCERNS DICTATE AGAINST GRANTING THE WRIT

Regardless of whether this Court determines that the "not pressed or passed upon below" rule is jurisdictional or prudential, this case presents many of the same policy and prudential concerns that dissuaded this Court from deciding the "good faith" issue in Illinois v. Gates, supra. These considerations militate

strongly against granting certiorari in the present case. The policy considerations expressed in Illinois v. Gates, supra, 76 L.Ed. 29, 527 at 537-38, with regard to this Court's relationship to state courts apply with equal force here. The Connecticut courts should be given an opportunity to consider this "issue of unusual significance", Id., 76 L.Ed. 2d 527 at 539, and fashion an appropriate remedy.

But, perhaps more important is the state of the factual record in this case. Here, as in Gates, the record contains little, if anything, regarding the subjective good faith of the officials that searched the Zindros premises. There was no testimony that the police subjectively believed this search was valid. Further, as the Connecticut Supreme Court explicitly noted, the record shows "that the belief of the officers that the search was proper

was unreasonable under the circumstances." State v. Zindros, supra, 255. (Pet. App. A p. 24a).

An examination of the record below demonstrates that the police were not at all mistaken as to the essential facts. The warrantless search occurred eleven days after the fire (Tr. p. 13) and therefore, no exigency to search existed at that time. (Tr. p. 109). At the time of the search the defendant was a suspect. (Tr. p. 19). The defendant was not contacted concerning giving any consent to the search. (Tr. pp. 14-15, 35, 49, 138-39). He lived in Waterbury (Tr. p. 100; 189 Conn. 228, 249; Pet. App. A p. 19a), and the police and the fire officials involved knew he was there. (Tr. pp. 23, 90, 91, 107-8; 189 Conn. 228, 249; Pet. App. A p. 19a). He had not fled nor is it claimed that he was likely to do so and this was eleven days after the fire. (189 Conn. 228, 249; Pet. App. A p. 19a).

The police knew that the consenting party was the owner of the restaurant building that was currently occupied by the defendant. (Tr. pp. 13, 19, 52). Yet, there was no testimony that the police made any inquiry of the owner as to his authority to permit a warrantless search of his tenant's premises.

Further, Detective Lieutenant Solomita was one of the two officers dispatched to seek the landlord's consent to enter the premises. (Tr. p. 13). Solomita lived in the area of the defendant's pizza business (Tr. p. 15) and had even been a patron there prior to the fire. (Tr. p. 15). When they entered for the search, after the landlord pried off the plywood on the front door (Tr. pp. 14, 17), the defendant's equipment was still there. (Tr. p. 52). They initially had seen it there eleven days earlier when police and fire officials were there with the defendant as well as

the landlord. (Tr. p. 29).

As in Illinois v. Gates, supra, this Court's consideration of whether to modify the exclusionary rule would plainly benefit from a record containing facts supporting the subjective good faith of the police. The present record is bereft of such facts. Also the state of the record, specifically the Connecticut court's failure to pass on the "good faith" issue, distinguishes this case from the decisions in People v. Quintero, ____Colo.____, 657 P.2d 948 (1983) and Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982) on which this Court has granted writs of certiorari to consider the "good faith" issue. See No. 82-963; 51 LW 3913 and No. 82-1711; 51 LW 3913-14. The courts in both People v. Quintero, supra, 657 P.2d at 950-951 and Commonwealth v. Sheppard, supra, 441 N.E. 2d at 725-26, unlike the Connecticut Supreme Court, explicitly reached the "good

faith" issue and rejected the application of the purported exception. The Connecticut court, far from rejecting the good faith claim, failed to even decide if such an exception existed. Further, in People v. Quintero, supra, 657 P.2d at 950-51 and Commonwealth v. Sheppard, supra, 441 N.E. 2d at 725-26, and unlike the present case, the good faith of the police was not in question.

The inadequacy of the record below exemplifies the wisdom of this Court's remarks in Illinois v. Gates, supra:

> "...[F]idelity to the [not pressed or passed upon below] rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of 'untoward practical ramifications...' not foreseen at the time of the decision." Id. 76 L.Ed. 2d 527 at 539. (Citations omitted).

This Court should not grant certiorari to review the "good faith" claim.

C

THE DECISION BELOW IS A PROPER APPLICATION OF THE EXCLUSIONARY RULE TO THE FACTS

The issue raised by the present case is whether the Connecticut courts erred in determining that the landlord's third party consent was invalid. Because the case involves nothing more than the application of settled precedents to the facts, the respondent contends that the decision is an inappropriate subject for Supreme Court review.

Despite the petitioner's assertion to the contrary, this is precisely a case "in which the landlord's right to enter and inspect is being advanced as a smoke screen to justify a landlord's consent to an intrusive search into private areas where the landlord has no interest except a desire to cooperate with the authorities." (Pet. Br. p. 10). The trial court expressly

found that "[T]he landlord did not enter the premises on February 23, 1977, to examine or inspect the premises for fire damage; rather he entered in the company of law enforcement agents for the sole purpose of searching for and obtaining evidence of arson....". (Memo. of Decision, Pet. App. B p. 5b).

Further, the landlord did not "enlist [ ] the aid of the police for the purpose of determining the cause of the conflagration." (Pet. Br. p. 9). Quite to the opposite, the police sought out the landlord and requested permission from him to search the premises. (Tr. pp. 13, 61).

The petitioner here and in the courts below predicates the alleged validity of the landlord's consent on the assertion that the "lessor had, by operation of a lease provision and the occurrence of the fire, a right of possession superior to that of the lessee." (Pet. Br. p. 9)

(189 Conn. 228, 244; Pet. App. A p. 14a). This claim was considered and properly rejected by the courts below.

The general rule of law is that a landlord may not consent to a search of the tenant's premises and this is true even where the landlord has some right to enter for purposes of inspecting and cleaning. Chapman v. United States, 365 U.S. 610, 616-17 (1961).

When the prosecution seeks to justify a warrantless search by proof of voluntary consent it is incumbent upon it to prove "that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 104, 171 (1974).

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which

justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements. See Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed. 2d 828 (1961) (landlord could not validly consent to the search of a house he rented to another), Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed. 2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." Id. p. 171.

Applying these precedents the trial court concluded that the landlord's consent on either the common authority or other sufficient relationship criteria of Matlock had not been proven by the State. (Pet. App. B at pp. 4b-5b). These findings were affirmed by the Connecticut Supreme Court. (189 Conn. 228, 248; Pet. App. A p. 18a). The trial court specifically found that the defendant had not abandoned the premises;

(Memo. of Decision; Pet. App. B pp. 3b, 5b) that the defendant had not terminated the lease; (Id. p. 5b) that the landlord had requested an additional month's rental from the defendant; (Id. p. 3b) and that the defendant had overtly exercised his possessory interest in the premises by requesting the landlord to leave. (Id. p. 3b). Significantly, there was no trial court finding or evidence that the landlord exercised his alleged "absolute right to temporary possession to make necessary repairs." (Pet. Br. p. 10) (189 Conn. 228, 248; Pet. App. A p. 18a).

Yet, contrary to the holding in Matlock and these factual findings the petitioner seeks to utilize property law via the terms of the lease to validate the landlord's consent to search. This approach, rejected in Matlock, Chapman, Stoner, and the Connecticut Supreme Court,

should not form the basis for a granting of a writ of Certiorari. As the Connecticut Supreme Court recognized, "it is the use of the property that is controlling, not the potential right to use." (189 Conn. 228, 247; Pet. App. A p. 17a) (emphasis in original). The petitioner has not presented any reasons why this Court should deviate from the precedents established in Chapman and Matlock, supra. Courts should be concerned not to sanction warrantless searches authorized by those who do not have a stake in refusing consent. Dotson v. Warden, 175 Conn. 614, 622, 402 A.2d 790 (1978).

Finally, to the extent that the petitioner is contending that the police conduct was the "most reasonable and appropriate course of action in light of all the circumstances and the lease," (Pet. Br. p. 11), it must be observed that "courts have strongly supported the preference to

be accorded searches under a warrant and have explicated that a doubtful or marginal case may be sustainable where one without it would fail. See, e.g. United States v. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965); Jones v. United States, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960)" State v. Zindros, supra, 254-55. The Connecticut courts did not misapply the exclusionary rule.

D

THE DEFENDANT'S REASONABLE EXPECTATION OF PRIVACY WAS FULLY CONSIDERED IN THE COURTS BELOW

The petitioner in Part IV of the brief argues that the Defendant had no reasonable expectation of privacy requiring suppression of the evidence. (Pet. Br. p. 12). The petitioner does not challenge the applicable law but argues instead that the facts "compel a finding that the tenant here had no actual expectation of privacy."

(Pet. Br. p. 13). In effect, the petitioner is asking this Court to retry the case. No claim has been made that an individual is being deprived of a right secured by the Constitution. Therefore, this Court should not sit to retry issues of fact heard and determined by the properly constituted tribunals of the state having jurisdiction of the subject. Portland Ry. Co. v. Oregon R.R. Commission, 229 U.S. 397, 412 (1912); also Evco v. Jones, 409 U.S. 91, 94 (Per Curiam, 1972); Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

The defendant's expectation of privacy was fully considered by the courts below. As the Connecticut Supreme Court noted:

> "There was ample evidence to support the trial court's determination that the defendant had a reasonable expectation of privacy 'in the burned out and boarded up building' as of February 23, 1977. The court properly found, on this issue as well as that of consent, that the defendant had not abandoned the leased premises.... On those occasions, between February

> 14 and February 23, when the defendant left the premises, he secured them. He not only said that it was his intention to stay, but he always secured the site upon leaving because 'I had my merchandise in there'. The defendant said that he had damaged personal property inside this building which he claimed was worth approximately $6,750. He said he was keeping the premises because he intended to reopen the business and he wanted to 'fix it so I could work'. No formal action was taken by either the defendant or the landlord to terminate the lease according to its terms in the event of a fire. The landlord did not ask him to leave and turn the premises over to him. His rent was paid through the end of February and so he felt he had a right to remain there until at least that time 'because of my rent paid.' He answered 'yes' to the question: 'Was it your intention to keep people out of the premises unless they were there with your permission?' There was thus evidence before the court that, if believed, actually demonstrates the defendant's subjective expectation of privacy."

State v. Zindros, supra, 240-41, (Pet. App. A pp. 10a-11a) (footnotes omitted).

Furthermore, the petitioner's argument seems to suggest that the defendant's expectation of privacy was not one which society would recognize as reasonable. The

short answer to this claim is that the decisions in Michigan v. Tyler, 436 U.S. 499 (1978); State v. Zindros, supra, 242 ("Zindros' expectation of privacy...was such that society would recognize it as reasonable."); and State v. Schonagel, 189 Conn. 752, 761, ____A.2d____ (1983) ("It suffices to note that a fire does not necessarily diminish the owner's reasonable expectation of privacy in the burned building.") are to the contrary.

The respondent respectfully submits, therefore, that this issue is inappropriate for Supreme Court review because it involves nothing more than the resolution of factual issues.

CONCLUSION

The courts below did not misapply the exclusionary rule. The decisions represent the application of settled legal principles to the facts as found by the trial court. Nor is this case the proper vehicle to discuss the possible "good faith" exception to the exclusionary rule. The Court is without jurisdiction to reach the "good faith" issue because the Connecticut Supreme Court did not pass upon the issue. Further, weighty policy and prudential concerns including an inadequate factual record militate strongly against the consideration of the "good faith" claim. The respondent, therefore, respectfully requests that this Court deny the writ of certiorari.

Respectfully submitted,

GEORGIOS ZINROS - RESPONDENT

BY _____
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His Attorney

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